KEJUTAN HOLDINGS SDN BHD

v.

MAGNUM 4D (PERAK) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING PETITION NO: D5-26-39-2004]
2 MARCH 2005

CIVIL PROCEDURE: *Parties - Misjoinder - Application to strike out names from originating petition and proceedings thereto - Whether parties relevant to proceedings - Rules of the High Court 1980, O. 15 r. 6(2)*

COMPANY LAW: *Members' right - Petition - Alleged acts of oppression and prejudicial conduct - Whether petition should be directed to only members or directors of company in question - Companies Act 1965, s. 181*

The 8th and 9th respondents applied under O. 15 r. 6(2) of the Rules of the High Court 1980 ('RHC') to cease to be parties in the proceedings relating to an amended petition filed by the petitioner against the respondents under s. 181 of the Companies Act 1965 ('CA'). The petition was filed based on alleged acts of oppression and/or prejudicial conducts on the part of the 2nd to 9th respondents in relation to the affairs of the 1st respondent. The 1st respondent was responsible as sole agent for 4D ticket sales in the state of Perak, Malaysia. The petitioner was the minority shareholder of the 1st respondent. It was submitted by the 8th and 9th respondents that they were not members or shareholders of the 1st respondent and that the allegations made against them stemmed from matters that were extraneous and irrelevant to the proceedings. It was not disputed that the 8th respondent was the subsidiary company of the 9th respondent whilst the 9th respondent held the controlling stake in the 1st respondent. Apart from being the ultimate holding company, the 9th respondent was also responsible for the promotion and management of the sale and distribution of 4D tickets in Malaysia. The petitioner alleged that the 1st respondent's core business was transferred to another subsidiary company owned by the 8th respondent. As such, the petitioner now found itself a shareholder in a company that had no business at all.

Held (dismissing the applications):

[1] There is nothing in s. 181 CA that states that only members of the company or its director or those in control of the company may be made respondents to the petition filed thereunder. The principle is that all alleged oppressors are proper parties to the petition including outside parties who are participants in the transactions forming the subject matter of the complaints. (p 774 c)

[2] Order 15 r. 6(2)(b) RHC gives a wide discretion to the court in making order relating to joinder of parties to a proceeding at any stage of the proceedings on such terms as it thinks fit either of its own motion or on application. (p 777 d)

[3] The amended petition clearly specified the relief claimed against the 8th and 9th respondents. Quite apart from the wrongful actions carried out by the respondents, the relief sought was a natural consequence of fault and/or fraud on the part of the 8th and 9th respondents. (p 778 c)

[4] The allegations or particulars of oppressive and/or fraudulent actions on the part of the 8th and 9th respondents were clearly and distinctively spelt out and their participation in the oppression was cogently and undeniably evidenced. The petition contained specific allegations of misconduct and fraud against them. In the face of those allegations, it was imperative that they address or respond through affidavits the allegations made against them. In the absence of credible explanation, those allegations must be accepted as true thereby making the respondents necessary and proper parties to the proceedings. (p 778 d-f)

[5] The inclusion of the 8th and 9th respondents was founded upon their alleged role and conspiracy that eventually led to the loss of the 1st respondent's core business to the new subsidiary of the 8th respondent. Due to their actions in colluding with the Board of Directors of the 1st respondent, the petitioner who had been a shareholder of a company conducting lucrative ticket sale business for more than 15 years now found itself a shareholder in a shell company. The 8th and 9th respondents were meanwhile enjoying the fruits of their alleged conspiracy as the holder of the concession under the new subsidiary. It followed that the 8th and 9th respondents should stay as respondents to the petition until completion to ensure that all matters in dispute be effectually and completely determined and adjudicated upon. Whether both respondents were relevant parties have to be proved by the petitioner in the proceedings. (p 781 d-g)

Case(s) referred to:

Automobiles Peugeot SA v. Asia Automobile Industries Sdn Bhd & Ors [1988] 3 MLJ 209

Bader v. Weston [1967] 1 CPD 134

Chong Hon Kuan Ivan & Anor v. Levy Maurice & Ors [2004] 1 SLR 545

Foo Bon Nyen v. Foo Yet Kai & Sons Sdn Bhd & Ors [1991] 2 CLJ 1364; [1991] 2 CLJ (Rep) 612 HC

Kumagai - Gumi Co Ltd v. Zenecon Pte Ltd & Ors [1995] 2 SLR 297

Lowe v. Fahey & Ors [1996] 1 BCLC 22

Paul Murray-Jones v. Hong Kong and Shanghai Banking Corporation & Ors [1982] HKLR 191

Re BSB Holdings Ltd [1993] BCLC 246 ***(foll)***

Re Little Olympian Each-Ways Ltd [1994] 2 BLCC 420 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 181(2)(c)

Rules of the High Court 1980, O. 15 r. 6(2)(b)

Companies Act 1985 [UK], ss. 459, 461

For the petitioner - Terrence KM Chan; M/s Lim Kian Leong & Co

For the 9th respondent - Alvin Tang Wye Keet; M/s Shook Lin & Bok

For the 8th respondent - Tharminder Singh; M/s Logan Sabapathy & Co

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali J:

Enclosures 7 and 17 are the 8th and 9th respondents' application for an order, *inter alia*, that the 8th and 9th respondents respectively cease to be parties to these proceedings and that their names be struck off the petition and all proceedings connected thereto. Essentially these applications are premised on the basis that both the 8th and 9th respondents had been, improperly and/or unneccessarily impleaded.

Factual Background

The petitioner filed the present petition dated 14 May 2004 (and amended on 15 December 2004) pursuant to s. 181 of the Companies Act 1965 against the respondents in respect of alleged acts of oppression and/or prejudicial conducts on the part of the 2nd to 9th respondents in relation to the affairs of the 1st respondent. In essence, the amended petition is founded upon four main complaints, namely:

1. **The Non-payment Of Dividends**

1.1. The petitioner complains that no dividends have been declared since the year 2000 and in the year 1999, the dividends were paid late.

1.2. The petitioner further complains that loans and/or advances have been made by the 1st respondent to its intermediate holding company (the 8th respondent) with no commercial benefit to the 1st respondent and in disregard of the interests of the shareholders of the 1st respondent to distribute these as dividends.

2. **The Overpayment Of Commission**

2.1 The petitioner refers to an award given in a private arbitration between Magnum 4D (Selangor) Sdn Bhd ("the area agent") and one Liew Wei Beng ("a selling agent in Selangor"), which ruled that the commission payable by the area agent to the 9th respondent is 4% of the net sales and not 25.43% as had been paid.

2.2. Based upon the above, the petitioner contends, *inter alia*, that the 1st respondent is entitled to a refund of sums representing the overpayments of commission, in the amount of RM342,278,947 from the 9th respondent.

3. **The Extraordinary Meeting (EGM) Of 24 June 2003**

3.1. The petitioner contends that an EGM of the 1st respondent held on 24 June 2003 is invalid and that the Resolutions passed thereat are null and void for, *inter alia*, purported lack of notice and breach of statutory and/or fiduciary duties of the 3rd to 7th respondents.

4. **Alleged Fraud On The Minority/Alleged Transfer Of Core Business**

4.1. The petitioner challenges the passing of a Director's Resolution dated 20 August 2003 and the alleged "Transfer of the Core Business" of the 1st respondent as fraud on the minority shareholders of the 1st respondent.

On 11 June 2004 the 8th respondent filed an application (encl. 7) to have its name struck out from the amended petition. On 24 August 2004, the 9th respondent followed suit and filed a similar application (encl. 17) to have its name removed.

Both the 8th and 9th respondents claim that they had been unnecessarily and improperly made a party to these proceedings. They relied their application under O. 15 r. 6(2) of the Rules of the High Court 1980.

Both the 8th and 9th respondents submit that the grounds of their applications are as follows:

(i) that they are not member or shareholder of the 1st respondent; and

(ii) that the allegation made against them stem from matters which are extraneous and irrelevant to the present proceedings.

Relationship Of The Parties

The 8th and 9th respondents are related to each other in that the 8th respondent is a subsidiary company of the 9th respondent.

The 9th respondent holds controlling stake in the 1st respondent through the 8th respondent and the 2nd respondent. The 2nd respondent is a subsidiary of the 8th respondent who in turn is a subsidiary of the 9th respondent. Apart from being the ultimate holding company, the 9th respondent is also responsible for the promotion and management of the sale and distribution of the 4D tickets in Malaysia and has control over, *inter alia*, the 1st respondent which is responsible as the sole area agent for 4D ticket sales in Perak. For this purpose, the respondent did execute an Area Agency Agreement with the 1st respondent for the sale of four digit (4D) number forecast tickets for the state of Perak. The Area Agency Agreement thus represent the Core Business of the 1st respondent identified in the amended petition which is the subject matter of the present dispute.

The Allegations & Relief Sought Against The 8th & 9th Respondents

Magnum 4D (Perak) Sdn. Bhd. (M4D), the 1st respondent herein, was until 31 December 2003 engaged in a business of holding, promoting, organizing and administering 4D numbers forecast tickets in the state of Perak under the abovementioned Area Agency Agreement with the 9th respondent. The petitioner is a minority shareholder of the 1st respondent holding 11.8% stake. The 2nd respondent, Long Term Profit Sdn. Bhd. is a majority shareholder controlling 67.7% stake in the 1st respondent.

The present dispute started with an arbitration award handed down in a dispute between Magnum 4D (Selangor) Sdn. Bhd. (an area agent) and one Liew Wei Beng (a selling agent in Selangor), sometimes in August 2002 which award concluded that the correct commission payable by Magnum 4D (Selangor) Sdn. Bhd. (as an area agent) to the 9th respondent should have been 4% of the net sales and not 25.43% as has been paid. Consequent to the said arbitration

award, the 9th respondent first wrote a letter to the 1st respondent requesting for confirmation that the commission due from the 1st respondent was 25.43% and not 4% of the net collection as decided in the arbitration. The off-short of the said letter led to the following consequences:

(1) The executive director of the 8th and 9th respondents, proposed a resolution at an EGM of the 1st respondent (without prior notice to the shareholders), which resolution had the effect of *inter alia*, confirming the commission due to the 9th respondent to be 25.43% and not 4% and effectively the arbitration award was not to be followed.

(2) The resolution was made to ensure that there would be no comebacks (for the overpayments) against the 8th and 9th respondents after they have carried out their "conspiracy" to strip the 1st respondent of the Core Business and to transfer the same to a subsidiary of the 8th respondent.

(3) Neither respondents deny that on the day resolutions were passed at the said EGM (which is supposed to be a private meeting of a private limited company), the 8th and 9th respondents were present at the meeting in the form of the executive director and the Finance Manager of the 9th respondent together with the Finance Manager of the 8th respondent.

The petitioner alleges that the said resolution was improper and the arbitration was the excuse used by the 8th respondent to transfer the entire Core Business out of the 1st respondent to another subsidiary company directly owned by the 8th respondent, called the French Development Co. Sdn. Bhd. and now conveniently restyled as "M4D (Perak) Sdn. Bhd." The petitioner now found themselves a shareholder in a company with no Core Business or any business at all. The new Company "M4D (Perak) Sdn. Bhd." is the new owner of the Core Business. The "rationale" for the transfer of the Core Business to the new subsidiary company was explained in a letter dated 29 October 2003 which was signed by the Executive Director of the 8th respondent and this is found in para. 74 of the amended petition. Substantive allegations have been made in the amended petition against either and/or both the 8th and 9th respondents and are found in paras. 34 onward of the amended petition.

The relief sought against the 8th and 9th respondents are found in prayer nos. 5, 8, 9, 10, 12 and 13 of the amended petition which include *inter alia*, the followings:

(1) a buy out order by the respondents including the 8th and 9th respondents herein at a fair value to be fixed by an independent firm of auditors and more importantly taking into account (a) the value of the Core Business of the 1st respondent before the hiving off to the subsidiary of the 8th respondent;

(2) an order for the 9th respondent (jointly and severally with the directors of the 1st respondent) to pay to the 1st respondent the amount of the Overpayments;

(3) an order for damages on account of the loss of profit occasioned by *inter alia*, the wrongful transfer of the Core Business; and

(4) costs.

In so far as the 8th and 9th respondents are concerned, the amended petition clearly specify the relief claimed against them on account of their participation in the two main elements in the so-called restructuring ie, the hiving off of the Core Business to the subsidiary of the 8th respondent (participated by the 9th respondent) as well as the deprivation of the 1st respondent to the Overpayments to the 9th respondent incurred over the years. Quite apart from the alleged wrongful actions carried out by the respondents, the relief sought is a natural consequence of the alleged fault and/or fraud on the part of *inter alia*, the 8th and 9th respondents. In none of the affidavits filed by the 8th and 9th respondents were there any attempts to seriously dispute or challenge the issues and allegations made against them by the petitioner. However, the affidavits filed in support of their respective applications, indicate a common defence which now asserts that the arbitration issue is an extraneous or private matter and does not concern the 1st respondent or the petitioner. To the petitioner, the inclusion of the 8th and 9th respondents in the present proceedings is not only necessary but crucial to determine the real issues in the matter before the court.

Misjoinder – Orders 15 r. 6(2) Of The Rules Of The High Court 1980

It is not disputed that the court clearly has the jurisdiction of make an order for any party improperly or unnecessarily added to cease to be a party under O. 15 r. 6(2) of the Rules of the High Court 1980. The relevant part of O. 15 r. 6(2) reads as follows:

Order 15 r. 6(2)(a)

> At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on an application – order any person who has been improperly or unnecessarily made a party ..., to cease to be a party.

To appreciate the application of the objection as to parties (under O. 15 r. 6(2) of RHC 1980) in the context of the present petition, the court has to examine the provisions of s. 181 of the Companies Act 1965 as well as equivalent provisions of other Commonwealth jurisdiction such as England and Singapore.

Section 181, provides that "any member (of a company), may apply to the court for an order under this section on the ground that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members, including himself or in disregard of his or her interest as members, shareholder of the company." The remedies available at the discretion of the court, which is no way exhaustive, are set out in s. 181(2) which provides:

> If on such applications, the Court is of the view that either of those grounds is established the Court may, with a view to bringing to an end or remedying the matter complained of make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:
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> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
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> (b) regulate the conduct of the affairs of the company in future;
>
> (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
>
> (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
>
> (e) provide that the company be wound up.

The first issue to be determined is:

Who are the proper parties under s. 181 petition?

Both the 8th and 9th respondent argues that a petition under s. 181 should only be directed against any member (shareholder) or directors of the company in question. It cannot be directed to include outside party, such as the 8th and 9th respondents who are not member nor shareholder of the 1st respondent at the material times. With respect, the court cannot agree with the respondents' argument on this issue. There is nothing in s. 181 to say that only members of the company or its director or those in control of the company may be made respondents to the petition filed thereunder. The principle is that all alleged oppressors are proper parties to the petition, including outside parties who are participants in the transactions forming the subject matter of the complaints. In this regards, the learned author of "Corporate Powers Accountability" has this to say of the power under s. 181:

> Generally, it is up to the petitioner to decide who should be joined as respondents apart from the company itself. The guiding principles are contained in O. 15 r. 6 of the Rules of the High Court 1980. In relation to a s. 181 petition, there is nothing in its terms to say that only members of the company, or its directors, or those in control of the company may only be made respondents to the petition. The principle is that all alleged oppressors are proper parties, including outside parties who are participants in the transactions forming the subject matter of the complaints and parties who will be effected by the relief sought.

In support of the above proposition, the court relies on the following cases. In *Re Little Olympian Each-Ways Ltd.* [1994] 2 BLCC 420, Lindsay J, after deciding that the English ss. 459 and 461 (equivalent to our s. 181) conferred a very wide jurisdiction, said:

> The impression given both in the sections and in the rules is that the greatest possible flexibility was intended by the legislature to be given to the Courts. Thus, s. 459 does not for example require that it is by a Respondent or by the Respondents to the petition that the affairs are being or have been conducted in the manner complaint of. It does not require that the Respondent to the petition should be limited to members of the company or to tits directors of to those conducting its affairs ...

The principles laid down by Lindsay J in *Little Olympian* have been cited by almost every other cases that follow after that. This was also the case relied on by the 8th respondent to have their name removed from the petition on account of Lindsay J's refusal to permit the outsider on that case (OAG) to remain in the petition. However, what the 8th respondent failed to note is that in the *Little Olympian* case, Lindsay J also found as a matter of fact that there was no allegations made against the outsider.

A more relevant case bearing on almost similar feature to the present petition where the court was asked to decide on a striking out application filed by B Sky B against it in a petition brought under s. 459 of the English Companies Act 1985 is the case of *Re BSB Holdings Ltd.* [1993] BCLC 246 (Chancery Division) where it was held:

> In determining who was a proper or necessary party to a s. 459 petition consideration had to be paid not only to the question of who were the persons responsible for the allegedly unfairly prejudicial conduct but also to the issue of who might be affected by the relief sought under s. 461 of the 1985 Act. On the facts, the relief sought if granted would affect the composition of the shareholders' meeting of B Sky B. In addition, B Sky B was directly involved in the various transactions involving Holdings which were said to be unfairly prejudicial to the petitioner. Accordingly, B Sky B had been properly joined and the application for the petitioner would be dismissed.

In that case the court also held that the presence of B Sky B was necessary to ensure that all matters in dispute were determined and there was an issue between the minority shareholders and B Sky B relating to the relief sought in the petition.

In *Lowe v. Fahey & Ors* [1996] 1 BCLC 22, Chancery Division, a third party which was allegedly involved in the misappropriation of company's assets was held to have been correctly joined as a respondent. The court further held that s. 461 (UK) conferred a very wide jurisdiction. Where the unfairly prejudicial conduct involved the diversion of company's funds, a petitioner was entitled to seek an order under s. 461 for payment to the company itself not only against the members, former members or directors allegedly involved in the unlawful diversion but also against third parties who had knowingly received or improperly assisted in the wrongful diversion.

In a Hong Kong case of *Paul Murray-Jones v. Hong Kong and Shanghai Banking Corporation and Others* [1982] HKLR 191 (Court of Appeal), it was held as follows:

(1) It is for the petitioner to decide whom he will join.

(2) The discretionary powers of the court under s. 168A of the Companies Ordinance are very wide and each case must be looked at on its merits.

(3) In the exercise of that discretion the court will consider *inter alia* whether by making a person a party the petitioner would not thereby gain any real benefit, in which event the joinder would be an abuse of process.

(4) In this case it was impossible to say that in joining any of the parties the petitioner had acted unreasonably in the sense that no possible benefit could accrue to him thereby.

In that case *(Paul Murray-Jones)*, the petitioner joined a bank, a subsidiary of the bank which held shares in the company and four nominee directors of the bank in the company as respondents Sir Alan Huggins VP refused to strike out the four nominee directors as respondents. It was said:

> It is not necessary for us to decide whether the nominee directors could properly be ordered to buy the petitioner's shares: the petitioner has, perhaps sensibly, not asked that they should. Nevertheless it may appear at the trial that some other order could properly be made against them personally. The fact that an order against the company might indirectly have the same effect does not seem to me to be a bar to the making of a direct order. It is for the petitioner to decide whom he will join and only if it were clear that no possible benefit could accrue to him from the joinder of the nominee directors could it fairly be held that the proceedings against them were an abuse of the process. The powers of the Court under s. 168A are so wide that I am not prepared to say that no possible benefit might result from the joinder.

In Malaysia, in the case of *Automobiles Peugeot SA v. Asia Automobile Industries Sdn. Bhd. & Ors.* [1988] 3 MLJ 209, the petitioner sought to amend the petition by adding the directors who were the oppressors, to hold them personally liable for damages to the company as a result of their oppressive conduct. In rejecting the argument that the proposed amendment was not proper and that a derivative action be brought, Siti Norma J (now CJM) said:

> The injured party in this action is the 1st Respondent and s. 181(1) and (2) of the Companies Act 1965 under which this petition is presented and relief sought was specifically enacted to overcome the problem posed by *Foss v. Harbottle* and to strengthen the position of the minority shareholders in limited companies. Since there is now statutory sanction for the shareholder with a minority interest in a company to institute proceeding against directors from conducting the affairs of the company in a manner prejudicial to the company, there is no longer any need for a derivative action to be filed by the petitioner in the manner suggested by the 2nd Respondent as that would amount to the same subject matter.

In *Kumagai - Gumi Co. Ltd. v. Zenecon Pte. Ltd. & Ors* [1995] 2 SLR 297, the Court of Appeal Singapore applied the decision in *Automobiles Peugeot SA.*

In 2004, the Singapore High Court in the case of *Chong Hon Kuan Ivan and Another v. Levy Maurice and Others* [2004] 1 SLR 545, dismissed an appeal against the refusal of the registrar to strike out the petition against the respondent in a petition, held this:

> The Defendants were allegedly responsible for misconduct and beaches of the various agreements which amounted to oppression against the Plaintiffs. The Defendants were properly joined because they were actors and played a major role in the transactions. Whether the Defendants were relevant parties had to be proved by the Plaintiffs. The Plaintiffs should not be deprived of the opportunity of presenting their case. The 1st and 3rd Defendants would be entitled to costs should the Plaintiff fail. The balance of justice between shutting out a claimant and incurring the inconveniences of the 1st and 3rd Defendants weighed in favour of allowing the Plaintiffs to proceed.

Order 15 r. 6(2)(b) of the Rules of the High Court gives a wide discretion to the court in making order relating to joinder of parties to a proceeding, at any stage of the proceedings on such terms as it thinks fit either of its own motion or on application. The said O. 15 r. 6(2)(b) provides as follows:

> At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application – (b) order any of the following persons to be added as a party namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all maters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
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> (ii) any person between whom any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

Abdul Malek Haji Ahmed J (now PMR) in the case of *Foo Bon Nyen v. Foo Yet Kai & Sons. Sdn. Bhd. & 6 Others* [1991] 2 CLJ 1364; [1991] 2 CLJ (Rep) 612 held:

a in the light of O. 15 r. 6 of the Rules of the High Court 1980 and s. 181 of the Act, I am more inclined to allowed the 6th and 7th Respondents to remain as parties so that all the issues affecting the relevant parties could be disposed off at one hearing.

b The point decided in that case was also brought about by a similar application for striking out for misjoinder by third parties who were not members of the company.

c In the present case, in so far as the 8th and 9th respondents are concerned, the amended petition clearly specify the relief claimed against them on account of their participation in the two main elements in the so-called restructuring ie, the hiving off of the Core Business to the subsidiary of the 8th respondent (participated by the 9th respondent) as well as the deprivation of the 1st respondent to the overpayment of commissions incurred over the years. Quite a part from the wrongful actions carried out by the respondents, the relief sought is a natural consequence of fault and/or fraud on the part of the 8th and 9th respondents.

d

e In the present case, the allegations or particulars of oppressive and/or fraudulent actions on the part of the 8th and 9th respondents are clearly and distinctively spelt out and their participation in the oppression is cogently and undeniably evidenced by their letters and attendance in the private meeting of the 1st respondents EGM. The present petition contained specific allegations of misconduct and fraud against the 8th and 9th respondents on their own as well as in an alleged conspiracy with each other or with other respondents.

f In the face of these specific allegations it is imperative that the 8th and 9th respondents address or respond through affidavits the allegations contained in the petition against themselves. In the absence of credible explanation, these specific allegations contained in the petition must be accepted as true by the respondents thus making them necessary and proper parties to the proceedings. All the factual averments of the petitioner as contained in the petition must

g be deemed to be true for the purpose of the striking out application.

h The 9th respondent also attacks on the amended petition in that the court lacks the powers to grant the relief sought by the petitioner. Apart from other orders, the petitioner seeks to be bought out of the 1st respondent at a premium making into account the value of the Core Business and the alleged 'overpayment' of commissions over the years. The 'buy-out' relief is sought against all respondents, except the 1st respondent.

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The 9th respondent submitted that the 'buy-out' relief sought by the petitioner is both unnecessary and inconsequential, as no benefit would accrue to the petitioner from the inclusion of the 9th respondent in the present proceedings. The 9th respondent further argued that on the facts of this case, there is absolutely nothing to suggest that if granted, a 'buy-out' order without the 9th respondent as a joint or several buyer would be impracticable, impossible or unworkable. To the 9th respondent, the essential relief of a 'buy-out' sought by the petitioner should only affect the 2nd respondent who is the majority shareholder of the 1st respondent.

The 8th respondent also attacks on the same relief sought by the petitioner. The 8th respondent contends that based on the provisions of s. 181(2)(c) of the Companies Act 1965, a 'buy-out' order is only to be addressed to other members of the company or the company itself, but not to outsiders.

The relevant provisions of s. 181(2)(c) of the Companies Act 1965 reads as follows:

> If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may – provide for the purchase of the shares ... of the company by other members ... of the company or by the company itself.

The powers given to the court under s. 181(2) of the Companies Act 1965 is very wide. It gives wide discretion to the court "to make such order as it thinks fit" with the view to bringing to an end or remedying the matters complained of. The powers to give order under para. (a) to (e) of subsection (2) are not exclusive. They are "without prejudice to the generality of the foregoing" provisions of s. 181. The type of relief that the court can grant under para. (a) to (e) represent mere examples of the type of order which may be made and are not intended to be exhaustive.

In this context, the court is in full agreement with Sir Alan Huggins VP in the case of *Paul Murray-Jones v. Hong Kong Shanghai Banking Corporation and Others (supra)* where the learned judge (on an objection that no order of 'buy-out' could be made against "Weston" – a person who was not a member of the company) quoted and adopted the decision of Mr. Justice Corbett in the case of *Bader v. Weston* [1967] 1 CPD 134 which held:

> As I have said, the wording of the section indicates the conferment of a wide discretion upon the Court. *Prima facie* an order for the purchase of the oppressed minority's shares by someone in the position of Weston would appear to be within that discretionary power. It would certainly achieve the object of the grant of relief under the section by bringing an end to the matters complained of. The argument is, however, that because the section mentions only orders for the purchase of shares by other members of the company or by the company itself, an order for the purchase of shares by some other person is precluded and that the Court's discretion is limited in this direction. I am unable to agree with this argument. It would mean that the words '... or for the purchase of the shares of any members of the company by other members of the company or by the company ...' must be read as exhaustively defining the types of order for the compulsory purchase of shares which the Court may make. Had these words stood alone there would have been much to be said for this argument. But they do not. They stand in association with words, both preceding and succeeding, which confer a wide discretionary power upon the Court. As I see it, they represent mere examples of the type of order which may be made and are not intended in an exhaustive sense at all.

The above proposition is further fortified by Lindsay J in the *Little Olympian* case *(supra)* when his Lordship confirmed that the court could if it chose make a buy-out order against an outsider. His Lordship also stressed that the wide powers of the court to grant remedies under an oppression petition in a s. 459 (UK) in wide and not intended to be cut down as clearly stated as follows:

> Nothing in the authorities suggested that the words of s. 459 and s. 461 should not be given their full effect: in an appropriate case relief could be sought against a non-member other than the company itself, or against a person not involved in the acts complained of (at least if that person would be affected by the relief sought) and a person against whom no relief was in terms sought could not necessarily escape being a Respondent. In point of jurisdiction the wide language of s. 459 and s. 461 was not to be cut down.

On the above authority and a close reading of s. 181(2)(c) the court holds that the 8th and 9th respondent's argument on this issue is without merit and should not be accepted.

The 9th respondent's additional ground for striking out is premised on the argument that the allegations against the 9th respondent stem from an award given in private arbitration between Magnum 4D (Selangor) Sdn. Bhd. and one Liew Wei Beng and on that score the 9th respondent produced a whole string of authorities on the legal effect and bindingness of private arbitration. The above argument is but a red herring as the 9th respondent refused and/or failed to appreciate that they were the parties who had used the arbitration issue to hoodwink the shareholders into relieving them of the liability of overpayment

of commission. If they are so confident that the arbitration issue was in fact a private or extraneous matter there certainly would have been no necessity to issue the letter to the 1st respondent requesting for confirmation that the commission due from the 1st respondent was 25.43% and not 4% of the net collection as decided in the said arbitration. More importantly their subsidiary's (the 8th respondent) explanation for the restructuring of the 1st respondent's operation and the hiving off of the Core Business would prove to have been a lie in the face of their current stance. This ground articulated by the 9th respondent makes it even more imperactive that both the 8th and 9th respondents be examined in court for their roles in the dispute. Their inclusion as parties to the present proceedings is necessary for the proper disposal of the dispute in toto.

Conclusion

Based on the above considerations and authorities, the court is satisfied that the inclusion of the 8th and 9th respondents is permissible in law as the facts for the present petition alleged against the 8th and 9th respondents are not premised upon the concept of collective liability within the group of companies. Their inclusion is not based on the fact that they are the intermediate and/or ultimate holding companies of the shareholder or member of the 1st respondent, but was based on their respective active roles in the whole alleged transactions. It is not framed on some fanciful or frivolous accusations but is founded upon their alleged role and conspiracy, which eventually led to the loss of the Core Business by the 1st respondent to the new subsidiary of the 8th respondent. Because of the actions of the 8th and 9th respondents who colluded with the Board of Directors of the 1st respondent, the petitioner who has been shareholder of a company conducting lucrative ticket sale business of more than 15 years now finds itself shareholder in a shell company. The 8th and 9th respondent meanwhile are enjoying the fruits of the alleged conspiracy as the holder of the concession under the new subsidiary known as M4D (Perak) Sdn. Bhd. and without worry of the overpayment due to the 1st respondent.

On that premise, the court finds that both the 8th and 9th respondents should stay as respondents to the present petition until completion, to ensure that all matters in dispute in the matter be effectually and completely determined and adjudicated upon. Whether both the 8th and 9th respondents are relevant parties have to be proved by the petitioners in the proceedings. The petitioner should not be deprived of the opportunity of presenting his case against both of them. Both the 8th and 9th respondents would be entitled to costs should the

petitioner fail. The balance of justice between shutting out the petitioner and incurring inconveniences of the 8th and 9th respondents weighed in favour of allowing the petitioner to proceed against both the 8th and 9th respondents in the present petition.

Therefore, the 8th and 9th respondents applications (encl. 7 and 17) are dismissed with costs.